

## STATE OF MAINE

### DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF	)	
CHANCE ALONG FARM, INC. AND WINTER	)	FINDINGS OF FACT,
POINT, INC. FOR AN AQUACULTURE LEASE	)	CONCLUSIONS OF LAW, AND
LOCATED IN MILL COVE, WEST BATH,	)	DECISION
SAGadahoc COUNTY, MAINE	)	

On July 24, 2000, Chance Along Farm, Inc. of Freeport, Maine and Winter Point, Inc. of West Bath, Maine, applied for an aquaculture lease totaling 13.25 acres in the coastal waters of the State of Maine, located in Mill Cove, West Bath, Sagadahoc County, Maine. The applicants requested the lease for a term of ten (10) years for the purpose of cultivating American oysters (*Crassostrea virginica*), surf clams (*Spisula solidissima*), European oysters (*Ostrea edulis*), and quahogs (*Mercenaria mercenaria*) using suspended and bottom culture techniques.

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that the project will not unreasonably interfere with the ingress and egress of riparian owners, navigation, fishing or other uses of the area; the ability of the site and surrounding areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state, or federally owned beaches, parks, or docking facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

A public hearing on this application was held July 23, 2001, at 7:00 p.m., in West Bath.

#### **Evidence Concerning the Nature and**

#### **Impact of the Proposed Lease**

The applicants' representatives were David Hennessey of Winter Point, Inc. and Peter J. Horne, president of Chance Along Farm, Inc. The representatives provided testimony on their respective experiences and the application. Exhibits 1 through 4.

The proposed lease would be located in Mill Cove off the west and south shore of the Winter Point peninsula that is bounded by Long Cove to the west and Brown Cove and a small island to the east. Mr. Hennessey testified that he would request to use the corrected acreage (13.49 acres) and coordinates in the Department's site report. The proposed site overall dimension is in the shape of an "L". Mr. Horne stated that the physical description on the cover page of the Department report was a better representation of the location as the drawing in their original application places the proposed boundaries closer to the shore south of Brown Cove than intended.

Members of Mr. Hennessey's family own the property on Winter Point, the small island, and the eastern shore of Brown Cove. Riparian landowner Dr. Rita Losee provided written permission for the use of her property and testified in support of the proposed operation.

The pending application was submitted in accordance with 12 M.R.S.A. §6072-A (20) to replace current limited-purpose leases held by David Hennessey and his brother, Jim Hennessey, located in Brown Cove and Long Cove.

Mr. Hennessey testified that his limited-purpose lease activities during the past three years have been successful. The proposed standard lease is considered a complimentary and financially viable venture to help sustain the Hennessey family's working farm heritage. The Hennessey's have developed a business relationship with the Horne family and Mr. Dana Wallace who operate a shellfish lease in nearby Maquoit Bay, Freeport, that is situated off the Horne family property.

The proposed lease area would contain one floating upweller system (FLUPSY), which is similar to an 8 x 40 foot floating dock. The FLUPSY contains an electric powered (quiet) pump and (electric) bubbler that circulate water (to deliver nutrients) and air through sixteen circular silos that contain the spat. Shellfish spat approximately 2mm in size, would be obtained from Maine hatchery-sources such as Marshall Point Sea Farm, LLC, in Port Clyde or Muscongus Bay Aquaculture, Inc., in Bremen, and placed in the FLUPSY. The device would be deployed for 6-7 weeks per year during June and July then removed and stored on the Hennessey's property.

When the spat reached ¼-inch in size they would then be transferred to the Chance Along Farm, Inc. lease site in Freeport to grow as “seed”, up to 1 to 1½ inches in size. At this size the shellfish would be transferred back to the proposed lease in Mill Cove. The larger size seed reduces the level of mortality caused by naturally occurring predators such as oyster drills, starfish or crabs, particularly when planted or reared on the sea floor.

Mr. Horne testified that, in various areas of the proposed lease site, different types of equipment would be used to raise the shellfish seed to market size, (approximately 3 inches within 2½ to 3 years in the case of oysters). The south center portion of the proposed lease would be used for planting shellfish freely on the bottom. Other portions of the lease would require some form of containment, particularly for predator protection. The eastern end of the proposed lease would contain up to two hundred (200) 7' x 50' x 1" plastic TENAX mesh envelopes (a type of shrimp netting) fastened to the mud bottom every 4 feet with a ¼-inch diameter metal staple. In the northwest portion of the site located in Long Cove, up to 1200 industry standard (black) plastic mesh (various sizes) “ADPI” bags would be deployed on the bottom in the mud. Each bag would be 18 by 40 inches and 3 to 6 inches in height.

Mr. Hennessey testified that the southwest corner is the deepest portion of the proposed lease with 6 to 8 feet of depth at mean low water. This deeper area would be used to deploy up to 400 lobster type cages made of stackable trays constructed of green or black-coated wire. An individual tray measures 30" x 30" x 3" high. These trays would be placed directly on the bottom and would not be stacked higher than 15 inches high (5 stacked trays) to avoid interference with vessel traffic. According to the application, trays placed on the bottom at the southwest corner would not be individually marked at the surface.

The application also describes a potential for suspending the stackable tray cages on the southwest corner using up to 400, 30-inch diameter, white polyballs. However, Mr. Hennessey testified that, to address objections to the visual impact of the potential deployment of 400 white polyballs, the maximum number of polyballs placed on the surface would not exceed forty (40).

Mr. Horne also testified that up to one hundred-fifty (150), 30-inch high cages (10 stacked trays) would be placed on the bottom along a 20-foot strip following the boundary within the proposed lease between corners B, C and D. These corners bound the west and south shoreline of Winter Point as described in the Department report. Marker buoys for these bottom cages would only be used to mark the ends of a string or row of cages. The representatives explained that the green or black wire stackable tray cages placed on the bottom between B, C and D would be visible to varying extents (6 to 30-inches) depending on how far the water drains at low tide.

The balance of the 150 stackable trays not placed on bottom between corners B, C and D plus up to the maximum of the 40 suspended cages in the southwest corner, could be placed on the bottom in the southwest area provided they are not stacked higher than 5 trays or 15-inches above the sea floor.

Mr. Hennessey explained that activity on the proposed lease would take place from a 17-foot work barge, a 12 by 14 foot work platform or float, a skiff (14-feet) and also on top of the upweller, when it is deployed. He testified that his brother also owns a skiff moored off his family's property. The skiffs are accessed via a haul out from shore that uses a small float. Mr. Hennessey testified that no other work floats or work boats would be required for the proposed lease activities and he does not anticipate any additional commercial boat traffic associated with the proposed lease, or that commercial traffic would increase compared to the activity level during the past three years of the limited-purpose lease term. All watercraft and suspended equipment would be moored on the proposed lease site with Helix type moorings and ½-inch chain. The watercraft and work platforms/devices would be moored off the southern end of Winter Point just south of a mussel bar and along the northern side of the deeper water area that extends from the southwest portion of the proposed lease through the middle area.

During June and July the spat reared in the upweller would be graded and removed, and the silos would be cleaned every 2 – 3 days or at a minimum once per week. The ADPI bags and TENAX envelopes would be inspected monthly during low drain tides and any fouling

organisms would be removed. The stackable trays would be inspected weekly, either by diver or hoisted onto the barge for maintenance, and cleaned of fouling organisms. Twice per season the trays would be washed with a high-pressure spray washer. Harvesting would take place using a simple drag from the barge; the trays or envelopes gaffed or hoisted onto a work vessel or by hand removal during a low drain tide (on foot).

The market-size shellfish would be counted, graded (culled) and bagged (100 count onion bags) either on the barge, work platforms, vessels or upweller. Transfer to shore would take place across the Hennessey family property. Most activity would take place during the months of May through December. Mr. Hennessey explained that during the winter months all floating and suspended gear, watercraft and work platforms would be removed, as the area will freeze solid with ice.

The representatives testified that noise would be minimal. The type of pumps used to run the upweller during June and July would be electric and, therefore, quiet. Mr. Hennessey testified they have not, and would not, use or play a radio (loud music) on the proposed lease. He stated that he is aware of clam and worm harvesters who work on the flats east and north of the proposed lease that sometimes play radios, which he could not control.

Mr. Hennessey testified that the proposed lease would not be worked on during nighttime hours and therefore would not require lighting at night, except, in the event of an emergency, such as securing gear during a hurricane. In response to questions about gear clean up or storage, Mr. Horne testified that all unused containment equipment or gear not deployed would be stored at the Horne's property in Freeport. The shorelines surrounding the proposed lease would be routinely checked for errant gear. Mr. Hennessey testified that all vessels, the upweller and work platform equipment would be stored on the Hennessey property when not in use, particularly during the winter months. Mr. Horne testified that no bags deployed to date on the current limited-purpose leases in Mill Cove have been lost to storms, or moved/dragged by ice in the winter.

Mr. Hennessey explained that navigation close to the south end of Winter Point is prohibitive due to a mussel bar, that Brown Cove is generally not used by boaters because it is a dead-end cove, and that the mud flats due east and northerly of the proposed lease are accessed by marine worm or clam harvesters that typically drive skiffs or small boats through the proposed lease area. Mr. Hennessey and Mr. Horne testified that they would maintain a clear navigation passage across the proposed lease, particularly in the southwest and deeper water area of the site. The proposed lease area is not used for commercial fishing such as lobster. Recreational fishing was described as consisting of 2 – 3 boaters per evening during summer months fishing for striped bass. The application requested that persons other than the applicants be prohibited from dragging. Other uses would be compatible with the proposed activities.

According to the application, the bottom sediments are primarily a silt and clay mix or soft mud with some hard bottom. No eelgrass has been observed. Local flora and fauna includes limited amounts of drift kelp, sea lettuce and a common filamentous green algae - Enteromorpha spp; local fauna includes hermit crabs, tunicates, common starfish, sand shrimp, green and rock crabs, blue mussels and a rare lobster. The mean tidal range is 9.2 feet with speeds under ½ knot. The depths across the area range from 2 to 10 feet at mean low water. Mr. Horne testified that the proposed site has good water flow and available food (nutrients) to support the proposed culture of shellfish. He explained that this area does not have a large number of the naturally occurring predatory oyster drill, which makes this area a favorable site for the proposed lease. He also testified that an adult oyster filters approximately 50 gallons of water per day, which would provide a positive benefit to the local water quality conditions.

According to the application, written permission from the Office of the Selectmen for the Town of West Bath was provided to the applicant for the approximately 7-acre intertidal area that overlaps with the Town's Municipal Shellfish Program/Ordinance jurisdiction. Under the West Bath ordinance, their shellfish program jurisdiction extends to extreme low water, or approximately minus two feet at MLW.

A biologist, employed by the Department, testified about the statutorily required site review that he and his assistant conducted November 3, 2000. The assistant revisited the site on December 20, 2000 to review the boundaries revised by the applicant and determine what portion of the proposed lease would be located within sub-tidal versus intertidal areas. The resulting acreage was corrected to 13.49 acres and the metes and bounds were verified using a survey quality differential global positioning system (dGPS) with sub-meter accuracy and Arc-View software with sub-meter accuracy. The Department report included: a SCUBA diver survey of the local flora and fauna and bottom composition; vertical profiles of temperature, salinity and depth; and proximity to the shore, local fisheries and to other leases. Exhibit 3.

The biologist testified that he took an underwater video that covered the proposed lease area from the east side beginning at the southeast corner, swimming due west then turning north 90 degrees and ending just short of the northeast corner on the western portion. The bottom was described as flat mud with a channel through to the center (west to east). Depth measurements ranged from approximately 3+ to 8+ feet at mean low water. Local flora in the Brown Cove portion of the site included a common observance of sea lettuce and an abundant amount of brown benthic diatoms and unidentified brown algae; local fauna included an occasional frilled anemone, green crab, hermit crab and rock crab and an abundance of sand shrimp. The Long Cove portion of the site flora included an abundance of rockweed, sea lettuce and tubed red weeds; local fauna included an abundance of green crabs plus empty American oyster shells, a common occurrence of red beard sponge, rock crabs, an occasional blue mussel, hermit crab and stalked sea squirt. According to the biologist's report the proposed lease does not fall within any designated habitats for endangered or threatened species or significant wildlife habitats regulated by the Department of Inland Fisheries and Wildlife (IF&W).

Nothing unusual was noted in the temperature or salinity recordings collected on November 3, 2000. The biologist testified that, in his opinion, the water flow was adequate to supply nutrients to raise shellfish in this area. He stated that oysters are filter feeders and are regarded as ecologically beneficial organisms. For example, oysters help remove bacterial

pollution. The biologist confirmed that the area is classified as “open approved” according to the DMR Public Health Division’s Water Quality Program. Red tide in this area is a normal occurrence usually during the month of May.

According to the biologist’s report the nearest distances to shore would be approximately 107 – 111 feet from the proposed corners B and C to the west side and southwest tip of Winter Point respectively. Several moorings for vessels and work floats were observed within the proposed lease boundaries and were identified as belonging to the Hennessey’s. These moorings are used in the operation of the two limited-purpose leases. The portion of the proposed site that encompasses the upper reaches of the channel from the western side of Mill Cove is approximately ten feet deep at mean low water and is the deepest area of the proposed site. According to the biologist’s report the proposed lease should not interfere with navigation in the area due to the nearby tidal flats and mostly shallow water depths, with traffic likely being limited to small recreational boats and skiffs used by clam harvesters. Two docks were observed on the shore south of Brown Cove. On November 3, 2000 no observations were made or expected of fishing activity. According to the biologist’s report, clam harvesting is likely in the upper reaches of nearby mud flats.

The biologist contacted the local Harbormaster regarding ice, navigation, moorings and traditional storm anchorages. The Harbormaster confirmed that in the winter the area ices over solid enough to walk on. Regarding navigation, in the Harbormaster’s opinion, the ability of vessels to navigate in the area of Mill Cove is dependent upon the tidal stage and draft of the vessel. He indicated that the proposed lease would not interfere with vessel traffic. Aside from the applicant’s moorings described previously, the Harbormaster identified one additional mooring associated with one of two docks located on the shore south of the proposed lease. The Harbormaster indicated that the proposed lease activities should not interfere with access to that mooring. The Harbormaster indicated that striped bass fishing does occur during the summer, was unaware of any amount of local clam digging and indicated that a few lobster traps may be set in the channel located south of the proposed lease. He confirmed that he had



received no complaints on the limited-purposed lease activities and did not anticipate any. He indicated a favorable opinion of the applicants and their proposed lease.

Several riparians expressed objections to the view of the proposed lease and the proposed use of up to four hundred (400) 30-inch diameter white polyballs on the surface in the southwest corner. One riparian testified that the applicant's willingness to change the number to forty (40) or less, would be more acceptable for both visual and navigation reasons. Another riparian, who also objected to the visual appearance of 400 polyballs, requested that a color less obtrusive than white be used, that the vessel and float moorings be condensed into one location, and indicated that the reduced number of polyballs was an improvement although none would be preferred. Exhibit 5.

Mr. Hennessey pointed out that concentration of vessel moorings would not be feasible given the need to use adequate scope on the mooring lines to compensate for wind, tides and adequate depth.

Several riparians testified that the proposed lease and/or future lease applications should be approved by the Planning Board, not by the Office of the Selectmen and indicated a negative impact to either their property value or taxation.

A riparian testified that he could vouch for the quiet noise level of the electric pump and bubbler used on the upweller on the existing lease.

A riparian whose property is on the shore south of Winter Point testified that the NOAA Nautical Chart depths in the deeper portion of the proposed lease are erroneous. In his opinion, the depths are more shallow and the contour line therefore further from the shore than indicated. He requested, that if a lease were granted, it include a directive that a clear navigation passage be maintained in the vicinity of the southwest corner where the depths shoal to two feet at low tide to maintain a passageway to access the docks along that shore.

Four members of the Hennessey family, as riparians or nearby property owners provided testimony in support of the proposed lease. A letter of support from riparian Richard Hennessey was also read for the record. Exhibit 6. The family members described a long family history

with their properties and stewardship of the land to retain for future generations without being forced to sell it for development. In their opinion, the proposed lease activities would be compatible with existing uses including swimming and navigation.

### **Findings of Fact**

The proposed lease is located in two dead-end coves around a point of land owned by relatives of one of the applicants. It is also bounded on the east end by a small island also owned by a family member. Approximately one-half of the proposed area falls within the intertidal zone, which is defined in the West Bath Municipal Shellfish Program as extending to extreme low water, or approximately minus two feet below mean low water. The remainder of the proposed lease area ranges from approximately 3 to 8 feet at mean low water and is located in the southwest and central areas of the L-shaped site according to the biologist's report. Written permission to access the site from her shorefront property on Winter Point was provided by riparian landowner Dr. Rita Hennessey Losee.

The use of the deepest area in the southwest/middle portions would be limited to a maximum of forty (40) 30-inch diameter polyballs used for suspending or marking gear. Bottom gear (stacked tray cages) placed within the deep area would not exceed fifteen (15) inches in height and would not be individually marked according to the representatives' testimony. The representatives testified that they would maintain a clear passage through this area for riparians and boaters in the area. According to the Department report the Harbormaster indicated that the proposed lease would not interfere with vessel traffic and, in the biologists opinion, the types of vessels typically traversing the area would likely be limited to skiffs used by clammers and small recreational boats due to the water depths.

Given the testimony and evidence that riparian permission for access was obtained, the applicants' willingness to reduce the quantity of 30-inch polyballs to 40 maximum; and the applicants' willingness to maintain clear passage for boaters accessing the shoreline south of Winter Point and Brown Cove, I find that the proposed lease will not unreasonably interfere with the ingress and egress of riparian owners and that it will not unreasonably interfere with

navigation typical to that area, particularly access to the shore due south, given the condition that the a navigational passageway shall be maintained across the southwest corner and deepest water area; the passageway, buoy placement and buoy color shall be approved by the U.S. Coast Guard as appropriate for marking the passageway.

The one existing aquaculture lease in the area is the 1.08-acre limited-purpose lease, which is tract 1 of the proposed standard lease, held by the one of the applicants. There is limited recreational use of the area for striped bass fishing and pleasure boats based on shallow depths of the area, and there is no commercial fishing, as confirmed by the Harbormaster. The representatives requested that dragging and harvesting by others be prohibited within the proposed lease. Based on the evidence that there is no commercial fishing in the area, that limited recreational activities take place and that there are no aquaculture leases other than the leases held by one of the co-applicants and his brother incorporated in the proposed lease, I find that the lease, with a condition to prohibit dragging by others, will not unreasonably interfere with fishing, aquaculture leases or other uses of the area.

The proposed activities include the rearing of indigenous American oyster, surf clams, European oysters and quahogs using suspended and bottom culture. Shellfish may be planted freely on the sea floor depending upon the hardness of the sediments and level of predation encountered. All grading, cleaning and harvesting would take place aboard the vessels or rafts described in the record. The applicant and Department's biologist testified to the benefits that the filter feeding action by shellfish is beneficial to the local water quality and that there is adequate water flow and feed to support the proposed level of shellfish culture. Based on the evidence and testimony, I find that the proposed activities will not unreasonably interfere with the ability of the site and surrounding areas to support existing significant flora and fauna.

According to the evidence only indigenous shellfish stocks of American oysters, surf clams, European oysters and quahogs would be obtained from hatcheries located within the State of Maine. Based on this evidence, I find that there is an available source of American oysters, surf clams, European oysters and quahogs.

A riparian owner provided written permission to the applicants for the purpose of using her property to access the proposed lease site. According to the application and Biologist's report there are no public landing facilities within 1,000 feet or that would be used in association with the proposed lease activities. Based on this evidence, I find that the proposed lease site activities will not unreasonably interfere with public use or enjoyment and that the proposed lease site is not located within 1,000 feet of any municipality, state or federally owned beaches, parks, or dock facilities.

### **Conclusions of Law**

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation given the condition a navigational passageway shall be maintained across the southwest corner and deepest water area; the passageway, buoy placement and buoy color shall be approved by the U.S. Coast Guard as appropriate for marking the passageway;
3. The aquaculture lease activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area and a condition that dragging by others is prohibited;
4. The aquaculture lease activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of American oysters, surf clams, European oysters and quahogs; and
6. The aquaculture lease activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

The evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072.

### **Decision**

Based on the foregoing, the Commissioner grants the requested lease of 13.49 acres, to the applicant for a period of ten (10) years from the date of this decision, for the purposes of cultivating American oysters, (*Crassostrea virginica*), surf clams (*Spisula solidissima*), European oysters (*Ostrea edulis*) and quahogs (*Mercenaria mercenaria*) using suspended and bottom culture techniques as described in the record. The applicant shall pay the State of Maine rent in the amount of \$50 per acre per year. The applicant shall post a bond or establish an escrow account in the amount of \$5,000, conditioned upon its performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

### **Conditions to be Imposed on Lease**

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

1. navigation is allowed in the open areas of the lease;
2. no dragging by persons other than the applicants or their employees is allowed;
3. the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources regulations Chapter 2.80; and
4. a navigational passageway shall be maintained across the southwest corner and deepest water area; the passageway, buoy placement and buoy color shall be approved by the U.S. Coast Guard as appropriate for marking the passageway.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

**Dated:** \_\_\_\_\_

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**George D. Lapointe (Commissioner)**  
**Department of Marine Resources**